

The Liquor Control Act of 1934 ("Act") imposes a tax upon the privilege of engaging in business as a manufacturer or as an importing distributor of alcoholic liquor. See 235 ILCS 5/8-1 et seq. (1996 State Bar Edition). (This is a GIL).

October 13, 1999

Dear Ms. Xxxxx:

This letter is in response to your letter dated July 28, 1999. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

I have enclosed a copy of our company's 1998 gift catalog for your review. The catalog offers gourmet food baskets, as well as gourmet food and wine baskets. It is our company's policy to only ship the gift items containing wine to states where it is legal. This catalog does not solicit the sale and shipment of alcohol to any state that prohibits such activity, in fact, every page containing wine states that shipping restrictions apply. We mail our catalog only one time a year and it offers consumers a choice to send gifts with wine to states that allow delivery of alcoholic beverages as well as receive or send gourmet food gifts to family, friends and client nationwide.

I am requesting a return letter from you stating whether or not there is any restriction to mail such an advertising piece to the businesses and residents in the state of Illinois. If it is your opinion that it is illegal for our firm to mail such advertisement to your state, our legal counsel requests that you cite the specific statutes restricting such activity. We are not requesting an uninformed opinion, rather specific legally binding information.

Thank you for your time and assistance in this matter. Please feel free to contact me at #### 204 if you have any questions regarding this request.

We cannot answer your question regarding possible advertising restrictions. We urge you to contact the Illinois Liquor Control Commission at (312) 814-2206. We can, however, provide information regarding potential tax liabilities. The following information outlines the principles of nexus. We hope it is helpful to you in determining whether you are responsible to pay tax in Illinois.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i), enclosed. This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801, enclosed. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in Quill Corp. v. North Dakota, 112 S.Ct 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Cause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. Quill at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to Brown's Furniture, Inc. v. Zehnder, (1996), 171 Ill.2d 410.

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State. The Use Tax rate is 6.25%.

The Retailers' Occupation Tax Act ("Act"), 35 ILCS 120/1 et seq. (1996 State Bar Edition), imposes a tax, at the rate of 6.25%, upon persons engaged in the business of selling at retail tangible personal property. A "sale at retail" is defined as "any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use or consumption, and not for the purpose of resale in any form as tangible personal property..." See the enclosed copy of 86 Ill. Adm. Code 130.201.

With respect to food for human consumption which is to be consumed off the premises where it is sold (other than alcoholic beverages, soft drinks, and food which has been prepared for immediate consumption), and prescription and non-prescription medicines, drugs, medical appliances, modifications to a motor vehicle for the purpose of rendering it usable by a disabled person, and insulin, urine testing utensils, syringes, and needles used by diabetics, for human use, the tax is imposed at the rate of 1%. See Section 2-10 of the Act. See 86 Ill. Adm. Code 130.310, enclosed. Alcoholic beverages are subject to the high rate (6.25%) of tax when sold at retail. Please note that Section 130.2060(a) states:

"Persons engaged in the business of selling alcoholic beverages to purchasers for use or consumption are required to remit Retailers' Occupation Tax to the Department upon their gross receipts from such sales, notwithstanding the fact that manufacturers and importing distributors of alcoholic beverages are required to pay certain taxes under The Liquor Control Act of 1934 (235 ILCS 5/1-1 et seq.)"

The higher rate of tax is applicable whether such alcoholic beverages are consumed on or off the premises where such alcoholic beverages are sold. In computing Retailers' Occupation Tax liability, no amount may be deducted from gross receipts from retail sales of alcoholic beverages to cover the taxes which have been paid by manufacturers or importing distributors of alcoholic beverages under The Liquor Control Act of 1934. The Liquor Control Act of 1934 ("Act") imposes a tax upon the privilege of engaging in business as a manufacturer or as an importing distributor of alcoholic liquor. See 235 ILCS 5/8-1 et seq. (1996 State Bar Edition). This gallonage tax on liquor is imposed upon "manufacturers" and "importing distributors."

However, please note that the Liquor Control Act contains an exemption from the definition of "sale in Illinois." Section 6-29, Interstate Reciprocal Wine Shipments, states as follows:

- "(a) Notwithstanding any other provision of law, an adult resident or holder of an alcoholic beverage license in a state which affords Illinois licensees or adult residents an equal reciprocal shipping privilege may ship, for personal use and not for resale, not more than 2 cases of wine (each case containing not more than 9 liters) per year to any adult resident of this State. Delivery of a shipment pursuant to this Section shall not be deemed to constitute a sale in this State.
- (b) The shipping container of any wine sent into or out of this State under this Section shall be clearly labeled to indicate that the package cannot be delivered to a person under the age of 21 years.
- (c) No broker within this State shall solicit consumers to engage in interstate reciprocal wine shipments under this Section. No shipper located outside this State may advertise such interstate reciprocal wine shipments in this State.

- (d) It is not the intent of this Section to impair the distribution of wine through distributors or importing distributors, but only to permit shipments of wine for personal use."

Sales of wine pursuant to Section 6-29 would not be subject to tax under the Liquor Control Act.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Melanie A. Jarvis
Associate Counsel

MAJ:msk
Enc.